UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:	
UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 328	
Petitioner	
And	**Case 01-RC-259277**
CURALEAF MASSACHUSETTS, INC.	
Respondent	

LOCAL 328'S MEMORANDUM IN RESPONSE TO CURALEAF'S REQUEST FOR REVIEW

Introduction

Curaleaf does *not* assert lack of Board precedent, unsupported factual determinations, improper rulings at hearing, or any compelling reason to reconsider a Board rule or policy. Curaleaf simply lost this case on the evidence. The Acting Regional Director ["ARD"] applied Board precedent that temporary employees with a finite tenure do not share a community of interest with regular employees.

Six (6) employees were transferred due to workplace closings and related regulations issued during the COVID-19 pandemic and voted challenged ballots. They had never worked in the unit before, retained their regular assignments, commuted clear across Massachusetts, received special hotel and travel benefits, were never assimilated into the unit and returned to their home store when regulations were relaxed. Stripped of Curaleaf's misrepresentations and with Curaleaf failing to present any testimony from store managers, this is a case in which the ARD made a factual determination. There is no substantial issue of law or policy; the Request for Review should be denied.

Facts

Just over a dozen employees work at Curaleaf's Hanover, Massachusetts, medical cannabis store. Curaleaf also operates adult-use ["AU"] retail stores in Ware and Provincetown and a co-located AU/medical store in Oxford. On April 20, 2020, a representation petition was filed for Hanover employees.

The pandemic struck in early March, 2020. All non-essential businesses, including AU retailers, were ordered closed. Petitioner's Exhibits ["PX"] 3, 4, 5, 6, 7. AU employees were thrown out of work. PX 31, 32, 33 (work schedules). Hanover remained open with restrictions, but many Hanover employees became sick or were required to quarantine and five or six were out every day. Transcript ["TR"] at 243. Employees who felt sick or unsafe were offered a two week leave of absence. TR at 89, 117; PX 9. Store Manager Carly Hayes emailed the "Hanover Team" on March 31:

> You do have the option to stay home using sick/vacation or unpaid time and your job will be protected. I will see you again soon and wish I could be there with you now. PX 9.

The AU closings spiked sales in Hanover. TR at 292. Some AU customers obtained medical cards. TR at 114; TR at 243, 293. Other AU customers with medical cards shopped exclusively in Hanover. PX 8. Curaleaf directed store managers to offer out-of-work AU employees shifts in Hanover. Nine (9) employees accepted transfer offers (six (6) voted). Transferees were "given the option" by their store manager to work in Hanover. TR at 138. Arrangements for the transfer were made between the transferees and their store manager, TR at 301, but Curaleaf presented no evidence from managers about what they actually said to transferees.

Curaleaf presented no documentation of the transfer offers.

Q. So sitting here today, do you have any documentation whatsoever with regard to the procedure for the temporary transfers which are the subject of this case?

A. (Ms. Orlandi) There is no documentation for that procedure.

Q. There's no email describing it, no text describing it, right?

A. Not to my knowledge.

Q. Well, you are the director of human resources. You would know.

A. Correct. And I communicated directly with managers face-to-face, over the phone.

Q. Face-to-face and over the phone are two different things.

A. Or over the phone. Face-to-face or over the phone.

Q. But it's true, Ms. Orlandi, that there is not a single document in all of Curaleaf that describes the procedure that you say was in effect with regard to these transfers. Right?

A. I cannot say there is no document. *I have no idea what the managers or how they -- I told them to ask people.*

Q. So that means also that with regard to the transferees, there were no written job offers.

A. There were not.

Q. There were no emails from you directing a particular person to work in a particular store while the pandemic was going on?

A. There is no emails of me directing anybody.

Q. There was no emails of you offering anybody employment in the Hanover store pending the pandemic?

A. There was not.

Q. There were no emails back to you asking about wages or benefits while they were transferred?

A. No.

Q. There is not a single stitch of paper describing this transfer policy during the pandemic. Right?

> A. There was not a transfer policy. I cannot say that there is not a stitch of any kind of communication written about it. But with me, no, there was none.

Emphasis added. TR at 285-6.

Curaleaf presented no evidence about how long transferees were offered employment in Hanover. *None of the managers who made the offers testified.* Two transferees testified that they were transferred because their home stores "shut down." TR at 199 ("everything shut down except for medical").

Transferees received special treatment. Neither the Employee Handbook, PX 12, nor the Handbook Supplement, PX 13, contains any provision for temporary transfers between stores and permanent transfer procedures were ignored. PX 12 at 30. Attendance rules were ignored. PX 12 at 9. Transferrees received paid breaks and paid lunch. PX 12 at 10; TR at 213. Transferrees were excused from rules on reporting hours. PX 12 at 10. Transferees were paid mileage and travel time. Hanover employees did not receive travel pay, lodging or any extra benefits for working during the pandemic. TR at 97.

Transferees never assimilated into Hanover. Hanover employees send and receive store wide texts, TR at 83-4, and group emails. PX 9. Transferees were not asked to participate. TR at 155. Most Hanover employees worked full time, TR at 80, but transferees worked part time.

According to Hanover work schedules, no transferee worked in Hanover prior to AU closing. PX 15. Curaleaf had no documentation of *any* individual going to Hanover from Webster, Oxford, Ware or Provincetown prior to the pandemic. TR at 288. Curaleaf presented no evidence of *any* prior transfers aside from transfers for training. TR at 196, 197.

AU reopened effective May 25 and Curaleaf announced that it was pleased to "get[ ] our people back to work." PX 19. Transferees shifts "dwindled down." TR at 98. Aside from a few shifts, the transferees returned to their regular schedule at their home stores.

Argument

I. THE ARD CORRECTLY DETERMINED THAT TRANSFERRES WERE INELIGIBLE TO VOTE

The ARD relied on *Marian Med. Ctr.*, 339 NLRB 127, 128 (2003); *St. Thomas-St. John Cable TV,* 309 NLRB 712, 713 (1992) and *Pen Mar Packaging Corp.*, 261 NLRB 874, 874 (1982). They hold:

> [A] temporary employee is an exception to the general rule that an employee who is employed and working in the unit on the payroll eligibility date and the date of the election is an eligible voter. If the employee's tenure remains uncertain, then the employee is eligible to vote. In determining this, "the Board examines whether or not the employee's tenure is finite and its end is reasonably ascertainable, either by reference to a calendar date, or the completion of a specific job or event, or the satisfaction of the condition or contingency by which the temporary employment was created."

Citations omitted. In other words, the ARD relied on the same cases the Board recently cited in *Phoenix New Times, LLC*, 370 NLRB No. 84, 2021 WL 534608, at *2. It is undisputed that the transferred employees were employed only briefly and never promised permanent employment.

> Even though temporary employees may share terms and conditions of employment with permanent employees, *they will be excluded from the bargaining unit if they do not have a reasonable expectation of reemployment, such as when they are employed for a brief period of time and given no promise of permanent employment.*

Emphasis added. *Phoenix New Times,* 2021 WL 534608 at *2.

Curaleaf improperly conflates the *duration of the pandemic* with the *duration of the transfers*. It argues that the transfers were indefinite because "no one … could have predicted the duration of the COVID-19 pandemic." Memorandum at 2. True enough, but as the ARD noted,

> the Employer oversimplifies the inquiry and conflates the different considerations of uncertainty. [D]uration of the transferees' employment was finite because it was based on the completion of the conditions that caused it, including the finite government orders that effectuated closures at other facilities while increasing the volume of sales in Hanover.

Decision at 5.

The ARD is correct on the facts. Closing Orders and the conditions they created were for a finite term. The initial closing of all workplaces was from March 24 to noon April 7. Union Exhibit 3 at 1. The Cannabis Control Commission ["CCC"] order was for the same finite term. UX 4 at 3. The CCC order allowing curbside pickup at Hanover was in effect only as long as the Governor's order. UX 5 at 5. The Governor's order relating to gatherings over ten (10) people was time limited to May 4. UX 6 at 2. The Governor's order of March 31 was also time limited to May 4. UX 7 at 3. And the CCC order of March 23 as amended on April 7 was time limited to May 4. UX 8 at 3. These regulations and orders created the temporary need for additional staff in Hanover and the resulting transfers. Hearing Officer Report at 20-21. All the Orders effectuating the transfers were for a finite term. And the conditions these orders created – retail closing, Hanover open with restriction, Hanover employees forced into quarantine – caused and limited the duration of the transfers.[1]

The ARD relied on uncontradicted evidence to establish that regulatory actions bookended the transfers. Transferee Joseph Bolandrina was asked how he started working in Hanover.

> That was right around, what was it, like the end of March is when COVID happened. *Most everything shut down except for medical*. So all of a sudden you hunker down and go what's next. When I heard that there's needing of help in Hanover, do I want to work in Hanover, I said absolutely yes, find a solution. So that's how I started to show up there.

Emphasis added. TR at 199. Transferee Daniel Harper said pretty much the same thing:

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[1] Curiously, Curaleaf attacks the ARD for finding that the transferees volunteered to work in Hanover. Memorandum at 22-23, Decision at 4. The ARD only made this finding because Curaleaf suggested that the transfers were permanent. Decision at 3-4, note 5. Curaleaf admits that the distinction between assignment and voluntary transfer is "meaningless under Board precedent." Memorandum at 23.

> *We got shut down* so at which that point there really wasn't anything for me to do …Once we found out we were closing we were given the option.

Emphasis added. TR at 138. HR Manager Kerin Orlandi confirmed this:

> Q. So you had an increase in volume at Hanover, an increase in personnel capacity everywhere else, and a decrease in personnel capacity in Hanover. Am I right?
>
> A. Correct.

TR at 294. Having conceded that cannabis demand increased, the transfers occurred only because retail facilities were closed and Hanover remained open *as a result of regulatory orders with a finite term*, it is obvious that transferrees would remain in Hanover only until adult use reopened and demand for product and employees dropped. And that is precisely what happened.

Curaleaf concedes that it was the *regulatory actions* – closing non-essential businesses including adult use retail, allowing medical cannabis to remain open, limits on walk-in customers, physical capacity limits, and curb-side pick-up – that caused increased demand in Hanover and staff availability elsewhere. Memorandum at 5. Massachusetts was "in a state of lockdown." Memorandum at 8.

Curaleaf's claim that the ARD improperly relied on post-eligibility date evidence is misleading. Curaleaf misrepresents the ARD's finding that the transferrees worked only briefly and erratically in Hanover, and ultimately returned to their regular assignments across the State. These findings were not "determinative" nor were they unwarranted. Memorandum at 23. The ARD referenced this evidence because it supports the conclusion that the transfers were only intended to be for a finite period. Curaleaf's argument is also hypocritical: *Curaleaf invited reference to exactly this evidence*. *See* Curaleaf Post-Hearing Brief at 16 ("the record evidence establishes that many of [the transferees] continue to work in Hanover six months after their

assignments commenced. Indeed, Bolandrina, Chartier, Demitiro (sic), Harper and Hughes continue to work in Hanover;" 19 (transferees "did in fact continue to work in Hanover after Curaleaf was permitted to reopen its other locations on May 25 to sell adult use cannabis. While Harper and Bolandrina may have worked less in Hanover after their primary locations reopened, they still worked in Hanover with sufficient regularity, consistent with Curaleaf's policy to have associates work at multiple dispensaries."). Indeed, both parties relied on this evidence at hearing, albeit to support a different inference. The Board relied on similar evidence in *Phoenix New Times*, 2021 WL 534608, at *2 ("At the time of the hearing, one of the two Fellows … was working on an extended fellowship, which had been extended for 3 months.") and has done so in the past. Decision at 6, note 8 citing *Pen Mar Packaging Corp.*, 261 NLRB at 874 and *St. Thomas-St. John Cable TV,* 309 NLRB at 712-713. Contrary to Curaleaf's claim, the schedules and payroll records corroborate testimony that the transfers were for a finite term.

Curaleaf's claim that the ARD ignored the voter eligibility date is a red herring. Memorandum at 15-17. The ARD expressly rested his Decision "on the employees' status on the payroll eligibility date." Decision at 5. Curaleaf falsely states that the ARD "focused exclusively" on events after the eligibility date. Memorandum at 26. The Decision and the Hearing Officer's Report contain innumerable references to what Harper and Bolandrina were told at the time they were transferred and to the government orders in effect at that time. The supporting evidence included:

- AU employees were thrown out of work due to the Governor's closing Order. Report at 22.
- Harper was asked if he wanted to "go help" in Hanover "due to COVID-19." Hanover employees were out of work "due to the pandemic." Report at 22.

- Bolandrina testified he was told there were "coverage-type" hours in Hanover due to the pandemic and he went there to "find a solution." Report at 22.
- Hanover was kept open as an "essential business" with employees consistently out due to COVID contemporaneous with an increase in customer volume. There was therefore an immediate, temporary need for additional staff. Report at 21. Orlandi testified that store managers were not told how long the transfers would last because "we had no idea how long we would *need them*." Emphasis added. TR at 245.
- Orlandi and Johnson directed store managers to "just … ask" their employees to "help in Hanover." Report at 21.
- Curaleaf ignored is own transfer policy for the transferees. Report at 22.
- Transferees primary work locations were much closer to their homes[2] and they received special compensation – outside the employee handbook and often 'off the books' to work in Hanover. Report at 23.

In addition, the ARD properly drew an adverse inference from Curaleaf's failure to call any of the store managers who spoke to transferees, or present any documentation regarding the transfers and *Curaleaf has now abandoned its exception to that finding*. Decision at 7; Hearing Officer Report at 21-22. Surely if transferees were told or records reflected that employment in Hanover was indefinite, Curaleaf would have presented someone or something to prove it.

Finally, Curaleaf concedes that "the [Hanover] business volume increased exponentially due to a surge in demand for medical marijuana (sic)" *associated with the Governor's AU*

[2] "[D]riving back and forth every day would have been crazy." TR 190 (Harper); PX 37 (addresses on voter list).

closing. Memorandum at 4. Curaleaf also relies on other regulatory changes that temporarily required increased staffing in Hanover. Memorandum at 3-4.

Curaleaf quarrels with the ARD over *Glesby Wholesale, Inc.*, 2002 WL 451942 (Div. of Judges Mar. 15, 2002), 340 NLRB 1059 (2003) and *N.L.R.B. v. New England Lithographic Co., Inc.*, 589 F.2d 29 (1st Cir. 1978), but both claims are inconsequential. Curaleaf cites *Glesby* for the proposition that events occurring after the eligibility date are "irrelevant" and "meaningless." Memorandum at 25-26. But plainly such events are relevant to the extent they cast light on the events that transpired on the eligibility date, Decision at 6, note 8, as the Board has found, supra at 5. The ARD was right to disregard *Glesby* to the extent it suggests the contrary.

Similarly, Curaleaf asserts that the ARD "claims he is not bound to the First Circuit's decision" in *N.L.R.B. v. New England Lithographic Co., Inc.*, 589 F.2d 29 (1st Cir. 1978), Memorandum at 27, note 9, but the ARD did nothing of the sort. He actually stated that he "does not rely on [*Curaleaf's*] *direct quotation* [from *New England Lithographic*] *setting out a date certain test*" because he is bound by Board precedent. Emphasis added. Decision at 4, note 6. So Curaleaf claims here that the ARD was rejecting First Circuit case law, when in fact he was rejecting Curaleaf's reliance on a passage from the decision that contradicts Board law. There is no date certain test in Board jurisprudence and the ARD was right to reject it. "The Board [in *Boston Medical Center*, 330 NLRB 152 (1999)] clarified that it will not find individuals to be temporary employees simply because their employment will terminate on a date certain." *Northwestern University*, 362 NLRB 1350, 1366 (2015). Mischaracterization of the ARD's decision and applicable Board law should not be rewarded.

II. THE ARD CORRECTLY DETERMINED THAT GIOSI'S BALLOT IS VALID

Giosi's original ballot was voided by the Board Agent due to the location of his signature on the envelope. He submitted a duplicate ballot. The Union filed an objection and the ARD ordered his ballot be reviewed subject to challenge. At the commencement of the hearing, Curaleaf stated that deferral to the challenge hearing was "procedurally improper" and challenged Giosi's ballot based on "signing of the envelope on the flap" (the same reason the Board Agent originally declared it void). TR at 9.

When two ballots are received, the earlier ballot should ordinarily be opened, *but prior to filing exceptions Curaleaf never questioned which ballot arrived first*. Had Curaleaf raised the issue, the Hearing Officer could have specifically addressed it.[3] He might also have directed the Region to produce the front of the envelope or other evidence to resolve the issue. Either way, it was Curaleaf's burden to prove the original was *not* received first, or at least to raise the issue. It should not be permitted to sandbag the Hearing Officer and thereby disenfranchise Giosi.

Consideration of Giosi's ballot in the challenge hearing was proper. The CHM authorizes the ARD to resolve an objection administratively, but instead he gave Curaleaf the opportunity to challenge the ballot *on the same grounds*. Curiously, Curaleaf maintains there is a different "decision tree" in an objection hearing, but it did not object to Giosi's ballot! The Hearing Officer rejected the challenge and determined that the location of the signature was not disqualifying. Report at 33. Curaleaf did not except to that finding and does not object now.

All of this is smoke and mirrors. The validity of Giosi's ballot was determined at hearing. Curaleaf's argument elevates form over substance. Decision at 8. No Rule has been violated and no substantial issue has been raised.

[3] As he did with another ballot. Report at 27, note 36.

Conclusion

For the foregoing reasons, the Request for Review should be denied.

UFCW Local 328

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Certification

I hereby certify that on the 22d day of February, 2021, I e-filed this document through the Agency's website and emailed a copy to Alan Model, Esq. at AModel@littler.com.

/s/ Janine Durand